EPA comments on S. 337, The FOIA Improvement Act of 2015

EPA concurs with the Department of Justice's October 2014 comments to S. 2520, which largely mirrors S. 337, "The FOIA Improvement Act of 2015." In communicating comments on S. 337, EPA urges the Department of Justice to reiterate its prior comments and include EPA's concerns, as outlined below.

Changes to Exemption 5

25-year sunset provision

The introduction of a temporal limit on the application of exemption 5 would be detrimental to EPA in three distinct areas: (1) enforcement and compliance, (2) Indian law, and (3) professional responsibility.

Enforcement and Compliance

EPA is concerned that the draft bill's twenty-five year sunset provision on Exemption 5 could seriously interfere with enforcement and compliance relating to various environmental statutes with which the agency is charged with enforcing. Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund, consent decrees often extend beyond twenty-five years. In fact, EPA has active consent decrees lasting forty years or more, some of which will have compliance monitoring periods that will last in perpetuity. For example, monitoring requirements may last in perpetuity where waste is left in place and operation and maintenance activities are needed to ensure that the remedy for the site remains protective of human health and the environment. Monitoring requirements may also exist for more than twenty-five years at sites where ongoing water treatment is necessary (e.g., to address acid mine drainage). Releasing information protected by Exemption 5, most notably the Attorney-Client and Attorney Work Product Privileges, would significantly harm EPA's ability to monitor effectively compliance with consent decrees and other negotiated agreements. Further, releasing information protected by exemption 5 could harm EPA's ability to resolve litigation prospectively via a negotiated settlement, which could substantially increase the agency's litigation costs and require substantial additional litigation resources.

EPA also has internal memoranda and policies over 25 years old that are still in effect that detail confidential enforcement related processes for identifying potentially responsible parties (PRPs) and evidence related to PRPs. Release of this information could compromise on-going enforcement actions in three situations: National Priorities List (NPL) sites where very old Special Notice letters have been issued, more recent sites that are similar to those sites in terms of the nature and location of contamination, and sites with common PRPs. Given the length of Superfund enforcement matters and related clean-ups and the complexity of investigations in terms of the extent of contamination, identifying sources of contamination, and identifying and locating contributors to contamination, release of this information could severely compromise and undermine Superfund enforcement and the U.S. Government's ability to recoup funds to pay for clean-up.

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There are several examples of situations where site monitoring will last for more than twenty-five years. Some of those include the Kennecott North Zone and South Zone sites, Libby Asbestos OU3 (the Libby Mine) Anaconda Smelter, the Clark Fork sites, the Reserve Mining site, the City of Gary (IN) and USX (also Gary IN) that began in the mid-1970s, Tar Creek, Grants Mineral Belt, and Bayou Sorrell.

Further, for several of our large groundwater Superfund sites which were listed in the 1980's and 1990's on the NPL, we have not yet selected final remedies for the sites. Releasing attorney-client and attorney work product privileged communications to the public (and the PRPs) would have a huge impact on EPA's ability to get liable parties to perform work at these sites and implement final remedies to ensure appropriate cleanup of the sites. The cleanup for these sites will cost millions of dollars over decades. Also, some of the remedies at these sites will require the PRPs to treat drinking water in perpetuity since proper cleanup is not possible. If we are unable to get the responsible parties to perform the required work, the federal government and the states (at a 10% cost share) will be forced to incur these costs.

A more specific situation within Superfund is that our settlements are subject to statutorily required reopener provisions, which allow us to take further enforcement actions in appropriate cases where additional compliance is required based on new information that, in some cases, may be received years later. EPA recently brought enforcement actions under certain reopener provisions in a 1983 consent decree. On September 19, 2013, the U.S. District Court entered a Supplemental Consent Decree with AVX Corporation for the New Bedford Harbor Superfund site. This Supplemental Consent Decree resolved the government's reopener claims from a 1992 consent decree, which settled lawsuits filed in 1983. Had EPA not entered into the 2013 settlement, the agency could be embroiled in litigation for which documents from prior to 1988 would be at issue. For these documents, the agency would certainly have needed to claim exemption 5 privileges. The need to claim exemption 5 is especially strong in the litigation context due to the increase in litigants' usage of the FOIA to attempt to circumvent the rules of discovery.

Setting aside Superfund, under other environmental laws, EPA often enters into consent decrees with parties that require compliance tasks that take decades to accomplish, particularly where the subject matter concerns mitigating aging infrastructure. A recent Clean Water Act case with the City and County of Honolulu resulted in entry of a consent decree, wherein the final date for compliance under the agreed-upon schedule is 2038, over 25 years after entry of the decree. Compliance schedules lasting more than 25 years also occur under the Safe Drinking Water Act, New Source Review/Prevention of Significant Deterioration pursuant to the Clean Air Act, and Underground Injection Control permitting pursuant to the Clean Water Act. As with Superfund, releasing attorney-client and attorney work product communications in these contexts would compromise EPA's ability to negotiate settlements prospectively and monitor compliance with existing agreements

Indian Law

Several federal environmental laws authorize EPA to treat eligible federally-recognized Indian tribes in the same manner as a state for implementing and managing certain environmental programs. These include the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Toxic Substances Control Act, and the Federal Insecticide, Fungicide, and Rodenticide Act. Jurisdictional disputes concerning tribal Lands may be the subject of litigation that lasts beyond twenty-five years.

Additionally, Superfund enforcement on tribal Lands has been ongoing for decades and continues to evolve. The legal advice provided, as well as the enforcement strategies developed, at various sites across the country on different tribal lands may be directly related to each other. Consequently, current active pending cases have direct precedential relation to prior closed cases. In some cases, EPA relies on the same enforcement strategy used in these prior cases. Therefore, a document that is at least twenty-five years old that contains privileged or otherwise protected information under Exemption 5 may cause harm to the agency's mission if released.

Recommendation- In light of the substantial issues outlined above, EPA recommends that the twenty-five year sunset provision be removed from S. 337. Alternatively, the provision could be increased to fifty years and apply only to the Deliberative Process Privilege and not to other evidentiary privileges such as Attorney-Client and Attorney Work Product. At the 50-year mark, protection under the deliberative process privilege could be extended only if an agency head determined that the materials still warranted protection.

Foreseeable Harm Standard

Adding the Foreseeable Harm standard to Exemption 5 with no provision for judicial deference to agencies would result in a massive increase in litigation and payouts of attorney fees. In fact, de novo review of an agency's determination that a foreseeable harm exists would be inappropriate in light of *Chevron* deference.

Recommendation – EPA prefers that the agency's foreseeable harm determinations not be judicially reviewable. Alternatively, the language of S. 337 should be crafted such that traditional canons of statutory construction would allow a court to grant deference to an agency's interpretation of whether specific information, if released, would foreseeably cause harm under *Chevron*. The legislative history should also reflect this change. Further, this agency deference should not be more stringent than an "abuse of discretion" standard of review.

Additional changes to the FOIA

50,000 page requirement to charge search fees for requests lasting more than 30 days

S. 337 also adds the requirement that in order to charge search fees for requests that extend beyond the initial twenty-day period and ten-day extension, the agency must determine that unusual circumstances apply and that "50,000 pages are necessary to respond to the request." The proposed requirement that "50,000 pages are necessary to respond to the request" is ambiguous and impracticable. It is unclear from this language whether 50,000 pages must be

actually produced to the requester or if an initial search result of 50,000 pages satisfies this requirement. Furthermore, the effort an agency must take to determine such a page count would require a large amount of time and resources considering that search results are not formatted in a way in which page counts are easily discernible.

Additionally, the proposed requirement incentivizes requesters to submit broader FOIA requests to avoid paying fees. Despite the agency's best efforts, there are times when it is not possible to meet statutory deadlines, particularly when the request is broad, requires extensive review to ensure PII or other protected information is not released, or involves other agency offices to fully respond to the request. Similarly, the statutory deadlines do not account for interagency consultation periods. Results would also include higher agency backlogs for both requests and appeals.

Recommendation- Eliminate the 50,000 page requirement.

Recommendation concerning missing standard for determining segregability

The EPA also recommends that on page 6 under (II) (aa) the word "reasonably" before the word "possible" be added so that the section reads, "consider whether partial disclosure of information is *reasonably* possible whenever the agency determines that a full disclosure of requested record is not possible." This addition would establish a standard for determining in which situations a document should be segregated and partially released. The next section, (bb), similarly includes the words "reasonable steps" when describing how to segregate information.